2011 IL App (2d) 091219-U
No. 2-09-1219
Order filed September 30, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARION H. PARHAM, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 09-CF-1900 Honorable Christopher R. Stride and Victoria A. Rossetti, Judges, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

Held: The trial court properly exercised judicial discretion in determining defendant fit to stand trial and denying defendant's motion to suppress identification; defendant's trial counsel was not ineffective for failing to tender IPI Criminal 4th No. 3.15 and the trial court did not commit plain error by not instructing the jury *sua sponte*; the trial court did not violate Supreme Court Rule 431(b); the State's closing argument was proper; the trial court properly assessed a fee for court services, but improperly assessed fees for a DNA analysis, Violent Crime Victims Assistance Fund, and a mental health court assessment; the trial court failed to consider defendant's ability to pay the public defender fee; affirmed as modified in part and vacated in part; cause remanded.

¶ 1 After a jury trial, defendant, Marion H. Parham, was convicted of attempted burglary and was sentenced to five years' imprisonment. Defendant does not challenge the sufficiency of the evidence on appeal. Rather, he contends the trial court committed various errors regarding his motion to suppress identification, his fitness to stand trial, Supreme Court Rule 431(b) (eff. May 1, 2007), Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) (hereafter, IPI Criminal 4th No. 3.15), and the assessment of fines and fees. Defendant further challenges his trial counsel's effective assistance and statements made by the State during closing argument. We affirm as modified in part and vacate in part, and remand the cause for notice and a hearing on defendant's financial circumstances and ability to pay the public defender fee.

¶ 2 FACTS

¶ 3 Motion to Suppress Identification

¶ 4 A witness, Marcus Grant, observed defendant attempt to break in a car parked in an alley behind his residence, located at 2201 Enoch Avenue, Zion, Illinois. Grant identified defendant as the offender at a showup within 20 to 25 minutes of the attempt. Defendant filed a motion to suppress identification, arguing that the procedures used by the police at the showup were unnecessarily suggestive and conducive to an irreparable identification.

¶ 5 At the hearing on the motion, Grant testified that, at approximately 1:30 a.m., on May 13, 2009, he looked out the windows of the back door of his house and glimpsed a "dark figure" standing next to his roommate's car. The car was parked in a row of parking spaces in the alley behind the back yard. An exterior porch light made it difficult to see, so Grant turned it off. A light near the driveway helped illuminate the area so that Grant could identify the suspect's color of clothing, racial background, and size. Grant noticed that the offender appeared to be holding a long,

thin, metal object, which he believed was a slim-jim that the offender was using to pry open the door of the car.

¶ 6 Grant opened the back door and called out to the offender. The offender stopped moving, and then ran away from the car towards a garage across the street. As Grant chased him, the offender picked up a bike and rode away down the dark alley. Grant tried to keep up, but the offender rode out of sight.

¶ 7 Grant returned to his house and then went back outside with his roommate, Erica Gomez-Aguirre, who owned the car. During the chase, Grant heard the sound of metal hitting the ground and he searched the area for a metal object but found none. Grant did find a light blue North Carolina jacket near the location where the offender picked up the bike. Grant and Erica drove around the area to see if they could find the offender but were unsuccessful.

¶ 8 Officer Kenneth Vaughn responded about five minutes after Grant and Erica called the police. Grant showed Vaughn the light, blue, North Carolina jacket and Vaughn immediately recognized it as one similar to a jacket worn by defendant. Grant told Vaughn that he was able to get a good look at the offender and could identify him. He described the offender as an African-American male, about six feet tall, and that he wore dark clothing. Vaughn radioed other officers to go to a location where Vaughn knew defendant could often be located, but Grant did not hear it.

¶ 9 Approximately 10 minutes later, the officers apprehended a suspect. Vaughn drove Grant to an alley behind 2330 Gabriel. Vaughn testified that there was at least one streetlight on in the area. As soon as they arrived, Vaughn shined a spotlight on the suspect. Grant estimated that he was approximately 25 feet away from the suspect. Vaughn estimated that it was 120 feet. Grant believed that the suspect was handcuffed behind his back and noticed that the only other persons in the area

were police. Vaughn could not remember if the suspect was handcuffed but agreed that there were at least two other officers present. The suspect wore a dark blue shirt, black jeans, and black tennis shoes.

¶ 10 Grant stated that he was asked if this was "the guy that you [had] seen," to which he replied yes. Vaughn testified that as soon as they reached the location where the suspect was detained, Grant stated without prompting: "That's him. That's the guy that I was chasing." Following the identification, police arrested defendant. Grant estimated that about 20 or 25 minutes had passed from the time he first observed defendant until the showup.

¶ 11 Following argument, the trial court found that there was nothing unnecessarily suggestive about the procedures used during the showup, and the court denied the motion to suppress the identification.

¶ 12 Fitness to Stand Trial

¶ 13 Before trial proceeded, defendant's counsel expressed her concerns about defendant's fitness to stand trial based on her interactions with defendant and conversations with defendant's mother. Counsel believed that the difficulties related to defendant's ability to understand. During a prior court date, defendant had voiced his objections about counsel's failure to take certain actions in his case. The trial court noted that counsel's concerns were supported by the court's own observations and found that a *bona fide* doubt about defendant's fitness to stand trial existed.

¶ 14 On September 1, 2009, defendant agreed to be interviewed by Dr. Anthony Latham. Latham noted that, during the interview, defendant gave satisfactory answers about his understanding of the criminal proceedings. However, Latham observed that defendant believed he was facing a sentencing range for a misdemeanor offense. Latham found that defendant had borderline

intellectual functioning, with an IQ in the range of 71-84. Latham also diagnosed defendant with dysthymic disorder, which is a chronic, lower intensity depressive disorder. Latham found that defendant's cognitive functioning was sufficient and concluded that, in his opinion, defendant was fit to stand trial.

¶ 15 Approximately one week after Latham completed his report, the State indicated to the trial court that it would stipulate to Latham's qualifications and the contents of his evaluation. Defense counsel stated that she had a chance to review the report and would also stipulate to Latham's qualifications and the contents of the evaluation. The judge then stated that she had reviewed the report and would accept the stipulations; thereafter finding defendant fit to stand trial.

¶ 16 Trial

¶ 17 At trial, Grant testified that he saw a person attempt to burglarize his roommate's car behind his house, which was located at 2201 Enoch Avenue in Zion, Illinois. Grant had been convicted of burglary twice and, at the time of trial, he was serving probation for one of those convictions. Grant was aware that the State's Attorneys' Office, which was overseeing his probation status, was the same office prosecuting the case against defendant.

¶ 18 Around 2 a.m. on May 13, 2009, he observed a person standing near the driver's door of the car owned by his roommate, Erica. Grant believed that he saw the person jam a skinny, long metal object between the window and the driver's door. He watched this person for about five seconds through the windows of his back door. The car was parked in a row of parking spaces behind the house. Grant was about 85 feet from where the car was located. The closest streetlight was located past the opposite end of the parking spaces from where the car was parked.

¶ 19 Grant opened the rear door of the house and called out to the person. Grant saw the person stop moving and then run away from the car towards a garage, located about 150 feet away. He chased after the person, and as he went around the garage, he briefly lost sight of the person. When Grant caught sight of him again, the person was riding a bike in the alley next to the garage and then rode out of sight. Grant heard a metallic sound hit something as the person rode away and Grant retrieved a flashlight from his house to see if he could locate it. He only found a light blue jacket near the area where the person retrieved the bike.

¶ 20 Grant did not see the person's face, only his side and back. He described the person as an African-American male, about 180 pounds, almost six feet tall, and that he was wearing dark clothing.

¶ 21 Grant returned to the house and spoke with Erica. Erica observed two dents by the top of the driver's door. She had driven the car the day before and never noticed that damage. After they tried on their own to find the offender, Erica contacted the police.

¶ 22 Officer Vaughn, who arrived to assist in the investigation, knew that the jacket was similar to the one he had seen defendant wear on a prior occasion. By radio, Vaughn gave Grant's description of the offender to other officers and told them to look for defendant near 2330 Gabriel.

¶ 23 Officer Vines and Sergeant Sweeting responded and, when they arrived, they observed defendant near an apartment complex. Defendant began to walk and Sweeting parked his squad car nearby. Once the officers confirmed that the person was defendant, they handcuffed defendant behind his back and detained him until Vaughn arrived.

¶ 24 Vaughn brought Grant to where the officers had detained defendant and he shined a spotlight on defendant. Defendant was still handcuffed, standing near four officers, and one officer stood right

next to him. Grant sat in the rear of Vaughn's squad car when Vaughn asked him if he could identify defendant as the person he had observed trying to enter Erica's car. Grant replied that defendant was the same person he had observed. Defendant was wearing a black "do-rag" on his head, a dark collared shirt, and dark blue pants. Grant testified that the officers turned defendant around, but Vaughn did not recall that occurring.

¶ 25 Defendant was arrested after the showup. The officers found green necklace beads inside the pocket of defendant's pants. Inside the light blue jacket found near the scene of the crime, officers found a necklace of green beads, a penlight, and a Link card, which corresponded to an account in defendant's name. The Link card is part of a program administered through the Department of Human Services, which provides funds for the purchase of food.

¶ 26 Deliberations, Verdict, and Posttrial Motions

¶ 27 During its deliberations, the jury sent a note to the judge, asking what would happen to defendant if the jury was hung. The judge sent a response to continue its deliberations. An hour later, the jury found defendant guilty of attempted burglary.

¶ 28 Defendant filed a posttrial motion arguing that the trial court erred in denying the motion to suppress Grant's identification and that the court allowed the prosecutor to engage in improper argument over objection. The trial court denied the motion.

¶ 29 The trial court sentenced defendant to five years' imprisonment and entered a monetary judgment of $1,177. Defendant's motion to reconsider his sentence was denied. This timely appeal follows.

¶ 30 ANALYSIS

¶ 31 Showup Identification

¶ 32 We first address defendant's argument that the trial court erred in denying his motion to suppress identification because the showup procedure was unnecessarily suggestive. A defendant cannot challenge the propriety of the trial court's denial of the defendant's pretrial motion to suppress by citing subsequent trial testimony where the defendant failed to renew his objection at trial. *People v. Ramos*, 339 Ill. App. 3d 891, 898 (2003). Here, defendant did not renew his objection at trial, and thus, our review of this issue is limited to the evidence presented at the suppression hearing. *Ramos*, 339 Ill. App. 3d at 898.

¶ 33 A two-step analysis is required when reviewing whether a showup identification should have been suppressed. First, the defendant has the burden to show that the confrontation between the defendant and the witness was "unnecessarily suggestive and conducive to irreparable misidentification" such that the defendant was denied due process. *People v. Moore*, 266 Ill. App. 3d 791, 797 (1994) (citing *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)). If the defendant meets this burden, then the State must show that, under the totality of circumstances, the identification was still reliable despite suggestive procedure. *Moore*, 266 Ill. App. 3d at 797. It is for the trier of fact to decide the weight of the identification evidence. *Moore*, 266 Ill. App. 3d at 798.

¶ 34 In reviewing the trial court's factual findings, we will reverse those findings only if they are against the manifest weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 274 (2009). The trial court's ultimate ruling on the motion to suppress is reviewed *de novo.* *Jackson*, 232 Ill. 2d at 274.

¶ 35 Defendant contends that the showup was unnecessarily suggestive, casting serious doubt on the credibility of the identification, because the police presented him to the witness while he was handcuffed, flanked by police officers, and while they shined a spotlight on him.

¶ 36 A showup, even conducted with a suspect in handcuffs, does not automatically weaken the veracity of an identification. See, e.g., *People v. Howard*, 376 Ill. App.3d 322, 331 (2007) (and the cases cited therein). One-person showups are suggestive by their very nature. *Howard*, 376 Ill. App. 3d at 331. While suggestive, they are justified and proper where the police respond to reports of criminal activity and present a suspect for identification shortly after a crime. See *Ramos*, 339 Ill. App. 3d at 897. Moreover, shining a light on a defendant so there is adequate illumination is not problematic. See *Ramos*, 339 Ill. App. 3d at 898. Accordingly, the State argues that this court must consider the "totality of the circumstances" surrounding the showup and whether the identification is reliable in light of the witness's opportunities to observe defendant. See *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (holding that "a claimed violation of due process of law in the conduct of a [showup] confrontation depends on the totality of the circumstances surrounding it") (*rev'd on other grounds*, *Griffith v. Kentucky*, 479 U.S. 314 (1987)).

¶ 37 Here, the evidence presented at the suppression hearing demonstrates that the showup was not unnecessarily suggestive. Grant expressed complete certainty in his unprompted identification of defendant. In addition, the time lapse between the crime and the identification was less than one hour. Grant had the opportunity to observe the offender during the commission of the offense. He was able to see the color of clothing worn by the offender, his build, and his racial background because he had a direct line of sight to the car and a streetlight illuminated the area. While Grant had heard Vaughn radio the description that he had given him, Grant did not hear that Vaughn recognized the jacket found at the scene as defendant's. The spotlight illuminating defendant ensured that the lighting was adequate for Grant to see defendant from a distance and for defendant

not to see Grant. Moreover, defendant does not contend that Vaughn did anything to influence Grant's identification of defendant.

¶ 38 Defendant relies on *People v. Carroll*, 12 Ill. App. 3d 869 (1973), to support his argument that the use of handcuffs and being flanked by police made the showup identification unnecessarily suggestive. However, no case has established a bright-line rule that the presentation of a suspect to a witness who is handcuffed or flanked by police automatically calls an identification into question. See *Howard*, 376 Ill. App. 3d at 332. Courts have upheld a showup identification even with the suspect handcuffed. See, *e.g.*, *Howard*, 376 Ill. App. 3d at 332; *People v. Tyler*, 28 Ill. App. 3d 538, 540 (1975).

¶ 39 Defendant contends that the showup was impermissible from the start because Grant never had a good opportunity to observe his face. While Grant may not have had a good opportunity to observe defendant's face, he did have an adequate opportunity to observe defendant's physical characteristics and clothing. The facts that Grant did not see defendant's face and based his identification of defendant on his general appearance go to the credibility and the weight to be given his testimony and do not make the showup unnecessarily suggestive. See *People v. Ruffalo*, 64 Ill. App. 3d 151, 157-58 (1978).

¶ 40 Considering the totality of the circumstances surrounding the showup and the reliability of Grant's opportunity to observe defendant's physical characteristics, we hold that the showup was not unnecessarily suggestive. Since we conclude that the showup was not unnecessarily suggestive, we need not address whether the identification was independently reliable or whether any error committed by the trial court in admitting Grant's identification of defendant was harmless.

¶ 41 Fitness to Stand Trial

¶ 42 Defendant argues that his due process right was violated when the trial court simply adopted the conclusions of the expert's evaluation to find defendant fit to stand trial without determining defendant's fitness independently. Defendant did not object to the trial court's determination that he was fit to stand trial or raise this issue in his posttrial motion. The State concedes that fitness for trial is a fundamental right that permits plain-error review. See *People v. Hanson*, 212 Ill. 2d 212, 216 (2004).

¶ 43 The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). However, we need not perform a plain-error analysis if we determine no error at all occurred. See *People v. Walker*, 392 Ill. App. 3d 277, 294 (2009).

¶ 44 Fitness for trial is an issue of "constitutional dimension," which means "the record must show an affirmative exercise of judicial discretion regarding the determination of fitness." *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001); *People v. Baldwin*, 185 Ill. App. 3d 1079, 1088 (1989); *People v. Turner*, 111 Ill. App. 3d 358, 365 (1982); *People v. Greene*, 102 Ill. App. 3d 639, 642 (1981). Normally, a trial court's decision that a defendant is fit to stand trial will not be reversed absent an abuse of discretion. *Contorno*, 322 Ill. App. 3d at 179. However, when required by law to exercise its discretion, the failure to do so may itself constitute an abuse of discretion. Regardless, the case law provides that, when the trial court completely fails to exercise discretion, it precludes our deferential standard. Therefore, we agree with defendant that our review is *de novo.* See *People v. Newborn*, 379 Ill. App. 3d 240, 248 (2008).

¶ 45 At the fitness hearing, the State noted that it had read the evaluation previously ordered by the court and stipulated to Dr. Latham's qualifications and the contents of the report. Defendant's counsel stated that she too had read the report and would stipulate to the qualifications and contents as well. The parties only stipulated to the contents of the report and to Dr. Latham's qualifications as an expert. Neither party stipulated that defendant was fit.

¶ 46 The trial court then stated:

> "The Court *has reviewed the report* that was done by Dr. Latham and, accepting the stipulations of the qualifications of Dr. Latham and his report, the Court *in reviewing the fitness evaluation* finds [defendant] is understanding of the nature and purpose of the proceedings, of who the parties are, what the charges are, the possible penalties, his right to a trial, his right to plead guilty if he chooses, and what a sentencing hearing is. And so, therefore, the Court will find [defendant] fit to stand trial and/or to plead." (Emphasis added.)

¶ 47 Defendant cites to *Contorno* to support his argument that the trial court failed to make an independent finding of his fitness for trial. At the fitness hearing in *Contorno*, both parties stipulated to the psychiatrist's report. The trial court then stated: "All right. We'll show pursuant to stipulation then [the psychiatrist] finds the defendant fit to stand trial." There was no further discussion on this issue. The court also entered a written order stating that, "pursuant to the People and Defense stipulation to the finding of Dr. Ali, Defendant is fit to stand trial." *Contorno*, 322 Ill. App. 3d at 178.

¶ 48 A court may accept stipulated testimony in its determinations of the defendant's fitness (*People v. Lewis*, 103 Ill. 2d 111, 116 (1984)), but a trial court's determination of fitness may not

be based solely upon a stipulation to the existence of psychiatric conclusions or findings (*Lewis*, 103 Ill. 2d at 115-16). However, if the parties stipulate to what an expert would testify, rather than to the expert's conclusion, a trial court may consider this stipulated testimony in exercising its discretion. *Lewis*, 103 Ill. 2d at 116. The ultimate decision as to a defendant's fitness must be made by the trial court, not the experts. *People v. Bilyew*, 73 Ill. 2d 294, 302 (1978); *Contorno*, 322 Ill. App. 3d at 179. The record must show an affirmative exercise of judicial discretion regarding the determination of fitness. *People v. Cleer*, 328 Ill. App. 3d 428, 431 (2002). A trial court must analyze and evaluate the basis for an expert's opinion instead of merely relying upon the expert's ultimate opinion. *Contorno*, 322 Ill. App. 3d at 179.

¶ 49 In *Contorno,* without any independent exercise of discretion, the trial court simply adopted the finding of the expert's opinion and the stipulation of the parties. Here, the trial court's statements reflect that it reviewed the fitness evaluation and then independently exercised its judicial discretion to determine defendant's fitness. Unlike in *Contorno*, the trial court accepted the stipulation of the parties to the existence of what the expert would testify to, not the expert's conclusion, in exercising its discretion.

¶ 50 Defendant argues that the trial court should have asked defendant or his attorney questions and should have considered more than just the fitness evaluation in making its determination of fitness. " '[W]e are aware of no statute or supreme court rule that requires trial courts to either independently question a defendant or make express findings of fact regarding fitness.' " *People v. Taylor*, 409 Ill. App. 3d 881, 899 (2011) (quoting *People v. Goodman*, 347 Ill. App. 3d 278, 287 (2004)). "Upon considering these stipulations and personally observing defendants, the circuit court could find defendants fit, seek more information, or find the evidence insufficient to support a

finding of restoration to fitness." *Lewis*, 103 Ill. 2d at 116. In this case, the trial court had no apparent reason to ask questions, as it reasonably could infer that counsel had no further concerns regarding defendant's fitness because defense counsel stipulated to the contents of the report.

¶ 51 Defendant asserts that the trial court did not make an independent finding of defendant's fitness because the court "missed" the fact that he was unable to comprehend the sentencing range that he faced. The fitness evaluation stated that defendant knew the sentencing range for his offense, but defendant believed that range did not apply to him, which the trial court clarified for defendant after it made a finding that he was fit to stand trial. Furthermore, simply because defendant did not believe that the sentencing range applied to him does not indicate that the court failed to exercise its discretion in finding defendant fit. In sum, because the evidence shows that the trial court independently reviewed the fitness evaluation, we find no error, and therefore, we need not perform a plain-error analysis.

¶ 52 Supreme Court Rule 431(b)

¶ 53 Rule 431(b) states:

> "(b) The Court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b)(eff. May 1, 2007).

¶ 54 We often refer to the four principles set forth above as the " *Zehr* principles," after *People v. Zehr*, 103 Ill. 2d 472 (1984), "the inspiration for Rule 431(b)." *People v. Blankenship*, 406 Ill. App. 3d 578, 580 (2010). The defendant in *Blankenship*, like defendant here, argued that the trial court did not comply with Rule 431(b) by failing to separately ask whether each potential juror understood the *Zehr* principles. We held that Rule 431(b) merely requires the court to ask each potential juror about acceptance only, and not whether he or she understood the enumerated principles, and therefore the trial court complied with the rule. *Blankenship*, 406 Ill. App. 3d at 581. Here, the trial court asked all of the potential jurors if they accepted the principles but many of the jurors were not asked whether they understood all of the principles. This was sufficient to show that the juror both accepted and understood each principle in accordance with *Blankenship*.

¶ 55 Defendant acknowledges that he did not preserve this issue for review. He also acknowledges this court's determination in *Blankenship*, but asserts that the reasoning "is incorrect and should not be followed." Defendant asserts that *Blankenship* "writes the word 'understands' out of the Rule, in violation of a cardinal principle of statutory construction that no term should be rendered superfluous or meaningless when construing a statute." Citing *People v. Thompson*, 238 Ill. 2d 598, 607 (2010), defendant argues that the rule's clear and unambiguous language requires the trial court to question the jurors about both concepts. Following the reasoning employed by the supreme court in *Thompson*, defendant asserts that we should conclude that Rule 431(b) was violated

here due to the trial court's failure to ask the jurors about their acceptance *and* understanding of all four principles.

¶ 56 We did not render any term superfluous or meaningless in construing the rule. Rather, our rationale was based on

> "the premise that a rational juror (which we presume any juror to be (see *People v. Wharton*, 334 Ill. App. 3d 1066, 1080 (2002))) would not claim to accept the *Zehr* principles unless that juror believed he or she understood them. This premise was itself based on the notion that acceptance implies understanding, at least so far as Rule 431(b) is concerned." *Blankenship*, 406 Ill. App. 3d at 582.

¶ 57 We explained our holding accorded with the text of the rule following the canons of statutory interpretation. In construing the rule, we noted that our primary task was to ascertain and give effect to the intent of the drafter, which should be given its plain and ordinary or "popularly understood" meaning. *Blankenship*, 406 Ill. App. 3d at 582. We observed that, in common usage, to "understand" a proposition is both to comprehend it and to assent to it and that "acceptance" implies "understanding," but "understanding" does not imply "acceptance." We saw nothing in Rule 431(b) to indicate that we should not apply this popular usage. *Blankenship*, 406 Ill. App. 3d at 583.

¶ 58 Our conclusion that "understanding" does not imply "acceptance" was the basis for our comparison to *Thompson*, where the supreme court held that it was error for the trial court to ask the jurors whether they understood a certain *Zehr* principle without also asking them whether they accepted it. *Blankenship*, 406 Ill. App. 3d at 583. In *Blankenship*, by contrast, the trial court asked each juror if he or she agreed will all four *Zehr* principles, which was sufficient to confirm whether

the jurors accepted the *Zehr* principles and sufficed to confirm whether the jurors understood the principles. *Blankenship*, 406 Ill. App. 3d at 581.

¶ 59 In *People v. White*, 407 Ill. App. 3d 224, 230 (2011), the First District Appellate Court found that the trial court's instruction to the jurors on the fourth principle was sufficient to determine whether the jurors accepted the defendant's right not to testify but did not ask whether the potential jurors understood that right, which "does not satisfy Rule 431(b)." We choose not to adopt the reasoning of the First District because we do not find it persuasive.

¶ 60 IPI Criminal 4th No. 3.15

¶ 61 Defendant contends that trial counsel provided ineffective assistance by failing to tender IPI Criminal 4th No. 3.15, and that the trial court is required to *sua sponte* give the instruction. IPI Criminal 4th No. 3.15 provides:

¶ 62 "When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:

[1] The opportunity the witness had to view the offender at the time of the offense.

[2] The witness's degree of attention at the time of the offense.

[3] The witness's earlier description of the offender.

[4] The level of certainty shown by the witness when confronting the defendant.

[5] The length of time between the offense and the identification confrontation."

IPI Criminal 4th No. 3.15

¶ 63 Ineffective Assistance of Counsel

¶ 64 To prevail on a claim asserting that trial counsel was ineffective, a defendant must first establish that "counsel's representation fell below an objective standard of reasonableness."

Strickland v. Washington, 466 U.S. 668, 688 (1984); *People v. Morgan*, 187 Ill. 2d 500, 529-30 (1999). Under *Strickland*, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance resulted in prejudice to the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Stickland*, 466 U.S. at 688, 694. It is the defendant's burden to show that he satisfies both prongs of the *Strickland* test before he can prevail on a claim of ineffective assistance of counsel. *People v. Evans*, 186 Ill. 2d 83, 94 (1999).

¶ 65 Defendant argues that the committee notes to IPI Criminal 4th No. 3.15 "practically mandates" the giving of the instruction whenever identification is an issue at trial and, because the State's evidence relied heavily on Grant's identification to prove its case, trial counsel's failure to tender IPI Criminal 4th No. 3.15 was not only ineffective assistance of counsel but plain error. We disagree with defendant's contention for three reasons.

¶ 66 First, defendant's misinterprets the committee note. The note does not *mandate* giving the instruction. Rather, the first sentence of the note states: "The Committee believes an instruction concerning particular types of evidence should not be given *unless* some special guidance from the judge would be useful." (Emphasis in original.) IPI Criminal 4th No. 3.15, Committee Notes.

¶ 67 Second, "[d]ecisions concerning defense counsel's choice of jury instructions" are "characterized as tactical decisions, within the judgment of defense counsel." *People v. Shlimon*, 232 Ill. App. 3d 449, 458 (1992). Because the instruction is not required, defense counsel was not incompetent for failing to offer it, as a decision to offer or not offer an instruction is a tactical one. See *People v. Houston*, 363 Ill. App. 3d 567, 575 (2006) (*aff'd* 229 Ill. 2d 1 (2008)). Furthermore,

defense counsel's decision not to offer the instruction was reasonable considering that the factors listed in IPI Criminal No. 3.15 appear to favor the State's case. Among other evidence, Grant's description of defendant's physical characteristics and his clothing showed his degree of attention at the time of the offense and his description matched the offender at the showup.

¶ 68 Third, because counsel attacked Grant's credibility throughout the trial, defendant was not prejudiced by defense counsel's decision to not tender the instruction. See *Houston*, 363 Ill. App. 3d at 575-76 (where defendant was not prejudiced by counsel's decision not to request IPI Criminal No. 3.15 because counsel adequately attacked the State's identification evidence throughout trial). Thus, tendering IPI Criminal No. 3.15 would not have changed the outcome of the trial, and as such, defendant cannot satisfy either prong of the *Strickland* test.

¶ 69 Defendant's reliance on *People v. Clay*, 349 Ill. App. 3d 24 (2004), does not support his argument. In *Clay*, the court found the police did not have probable cause to arrest the defendant based on the fact that his wallet was found lying on a busy street next to the sight of a robbery, and no other evidence connected the defendant to the robbery. *Clay*, 349 Ill. App. 3d at 29-30. Here, by contrast, defendant's North Carolina jacket with his LINK card in the pocket was not the only evidence connecting defendant to the crime. In addition, Grant gave a specific description of the offender and Vaughn testified that on prior occasions he had seen defendant wear a North Carolina jacket similar to the one Grant found in the alley.

¶ 70 *Sua Sponte* Instruction

¶ 71 Defendant argues alternatively that his conviction should be reversed because the trial court committed plain error by not instructing IPI Criminal No. 3.15 *sua sponte*. Defendant fails to cite authority for this proposition. Moreover, had the court instructed the jury *sua sponte*, it would have

infringed on defense counsel's right to make tactical decisions concerning defendant's defense. We observe also that the jury was given an instruction to consider when assessing the credibility of Grant's identification of defendant as the offender. See IPI Criminal 4th No. 1.02. That the jury's note to the judge indicated that they did not believe the identification evidence was overwhelming is pure speculation.

¶ 72 Closing Argument

¶ 73 Defendant next contends that statements made by the prosecutor during closing argument were improper. Defendant concedes that he failed to properly preserve the issue by failing to raise it with specificity in his posttrial motion and requests that we examine the issue under the plain-error doctrine.

¶ 74 Generally, prosecutors are afforded a great deal of latitude during closing argument. *People v. Slabaugh*, 323 Ill. App. 3d 723, 729 (2001). The State may comment on the evidence and all reasonable inferences drawn therefrom. *People v. Blue*, 189 Ill. 2d 99, 127 (2000). In reviewing comments made at closing arguments, we must ask whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilty resulted from them. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007) (citing *People v. Nieves*, 193 Ill. 2d 513, 533 (2000)). In determining whether a prosecutor's remarks were improper, the closing arguments of both the State and the defendant must be viewed in its entirety and the allegedly erroneous remarks must be viewed contextually. *Blue*, 189 Ill. 2d at 128; *People v. Nemke*, 46 Ill. 2d 49, 59 (1970).

¶ 75 During closing argument, the prosecutor told the jury that the key issue was identity and that Grant's description of defendant was very strong, emphasizing that the Link card and two necklace

pieces helped prove that defendant committed the offense. The prosecutor stated that any missing evidence was a "red herring," and noted that "[a] trial is about one thing, and that is about examining the evidence that we do have, analyzing it critically." Defense counsel argued during closing argument that the presence of the jacket 150 feet away from the car was not enough evidence to convict defendant, that Grant's ability to observe the offender was poor, and that Grant identified defendant because he was in handcuffs with a spotlight shining on him as police officers stood by.

¶ 76 Defendant maintains that the State minimized its burden of proof by telling the jury that the case was not about what evidence was not recovered and that defense counsel's arguments to the contrary were "red herrings." We find no error.

¶ 77 During opening statements and throughout the trial, defendant theorized that the police investigation was lacking. It is not improper then for the State to respond to and criticize that theory by telling the jury to focus on the evidence adduced at trial that supported a finding of guilt. By calling defendant's theory a "red herring," the prosecutor merely suggested that defendant's points were immaterial or irrelevant to the determination of guilt of innocence. See *People v. Hicks*, 101 Ill. App. 3d 238, 243 (1981) ("There is nothing improper in suggesting that the opponents' arguments are immaterial or irrelevant"). Accordingly, because we find no error, plain error does not apply.

¶ 78 Fines and Costs

¶ 79 We last consider the various fines and costs imposed by the trial court. Although these claims were not properly preserved for review, "a sentence, or portion thereof, that is not authorized by statute is void," and "a void order may be attacked at any time or in any court, either directly or collaterally." *People v. Thompson*, 209 Ill. 2d 19, 23, 27 (2004).

¶ 80 Public Defender Fee

¶ 81 Defendant contends that the imposition of the public defender fee without the trial court's consideration of his ability to pay was plain error. He further argues that the matter cannot be remanded for a hearing. The State concedes that the fee was wrongly imposed without a hearing (see *People v. Love*, 177 Ill. 2d 550, 563 (1977) (a hearing on the defendant's financial circumstances and ability to pay must take place prior to requiring the defendant pay a public defender fee)), but the State requests we remand the matter for a hearing. In *People v. Schneider*, 403 Ill. App. 3d 301, 303-04 (2010), this court vacated the public defender fee and remanded for notice and a hearing to determine the defendant's financial circumstances and ability to pay. Accord *People v. Gutierrez*, 405 Ill. App. 3d 1000, 1003 (2010). We see no reason to depart from our recent decisions. Therefore, we vacate the public defender fee and remand for notice and a hearing on the matter.

¶ 82 DNA Fee

¶ 83 We further find that, because the supplemental record indicates that defendant's deoxyribonucleic acid (DNA) had been collected for a prior conviction, the DNA analysis fee imposed by the trial court must be vacated. See *People v. Marshall*, 242 Ill. 2d 285, ___ (2011) (statutory requirements are fulfilled once a single DNA sample from each member of that population is registered).

¶ 84 Mental Health Court Assessment

¶ 85 Defendant contends that the $10 mental health court assessment should be offset by the credit he received for his time in pretrial custody because the assessment is considered a fine. See *People v. Graves*, 235 Ill. 2d 244, 255 (2009). The State agrees that defendant is entitled to $5 per day credit for each day incarcerated toward this fine. When mandatory fines are assessed by the clerk, we may

vacate the fines, reimpose them, and amend the judgment order. *Schneider*, 403 Ill. App. 3d at 304-05. Accordingly, we vacate the $10 fine and amend the judgment order to reflect that the $10 mental health court assessment should be offset by defendant's earned $5 per-day credit.

¶ 86 Violent Crime Victims Assistance Fund

¶ 87 Because defendant was assessed the $10 mental health court fine, he should have been assessed only $4 under the Violent Crime Victims Assistance Fund (725 ILCS 240/10(b) (West 2010)). The State agrees. Accordingly, the fine is reduced to $4.

¶ 88 Court Services Fee

¶ 89 Defendant claims that a $25 fee for court services was improperly assessed against him because the statute does not authorize such a fee for the offense of attempted burglary. 55 ILCS 5/5-1103 (West 2010). The State properly notes that the fee assessed by the court was $20 but disagrees with defendant that the fee may only be assessed for the offenses enumerated in section 5-1103. This argument was rejected in *People v. Williams*, 405 Ill. App. 3d 958, 965 (2010), where the court found "it is clear that the statute permits assessment of this fee upon *any* judgment of conviction but also permits such assessment for orders of supervision or probation, made without entry of a judgment of conviction, for certain limited and enumerated criminal provisions." (Emphasis added.) Accord *People v. Adair*, 406 Ill. App. 3d 133, 144-45 (2010), and *People v. Anthony*, 408 Ill. App. 3d 799, ___ (2011). We follow the holdings in *Williams*, *Adair*, and *Anthony*, and therefore hold that the court services fee was properly assessed following defendant's conviction.

¶ 90 Delinquency Fee

¶ 91 As to the 30% statutory delinquency fee, defendant contends that it was imposed on an inaccurate, inflated amount of the fees and costs assessed against him. The State responds that we

should impose a 30% cost on the newly calculated amount because defendant made no payments toward any of the fines or costs assessed. Because we are substantially reducing the amount unilaterally assessed by the clerk of the court, it would be unreasonable to find defendant was delinquent in paying his fines and costs. Accordingly, we vacate this assessment.

¶ 92 CONCLUSION

¶ 93 Based on the preceding, we affirm as modified in part and vacated in part, and remand the cause with directions for notice and a hearing on the matter of the public defender fee.

¶ 94 Affirmed as modified in part and vacated in part; cause remanded.